IN THE

Supreme Court of the United States

October Term, 1978

No. 78-912

DR. M. OSKOUI,

Petitioner,

vs.

THE UNIVERSITY OF PITTSBURGH; WESLEY POSVAR, Ph.D.; NATHAN J. STARK; JOSEPH A. BIANCULLI, Ph.D.; JOSEPH P. BUCKLEY, Ph.D.; BALWANT N. DIXIT, Ph.D.; RHOTEN SMITH, Ph.D.; EDISON MONTGOMERY; FRANCIS S. CHEEVER, M.D.; WILLIAM H. REA; ROGER S. AHLBRANDT; HENRY L. HILLMAN; S. HARRIS JOHNSON, III, M.D.; LEON FALK; C. HOLMES WOLFE, JR.; and HARVEY J. HAUGHTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiff petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed a district court's dismissal of Plaintiff's lawsuit for his failure to appear for a deposition when without counsel.

Opinions Below

The Court of Appeals issued a judgment order, without an opinion, which appears at 582 F.2d, 1275 and which is set forth in Appendix B, *infra,* at p. 23. The decision of the District Court dismissing the action is not reported, and is set forth in the Appendix C at p. 25, along with prior orders relevant to the dismissal order in Appendixes D and E. The District Court's memorandum denying Plaintiff's Motion to Recuse is set forth in Appendix F, p. 42.

Jurisdiction

The judgment order of the Court of Appeals was issued September 11, 1978 and the mandate entered October 3, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I. Whether dismissal of an action for failure of a party to appear for his deposition is an abuse of Rule 37, F.R.Civ.P., and a denial of due process where:

1. the party was without counsel and diligently seeking to retain counsel;

2. the party relied on a previous order that dismissal would *not* be imposed for failing to give his deposition; and

3. the dismissal order was entered five months after the party obtained counsel who had promptly offered to cure any earlier defaults.

II. Whether in exercising its discretionary powers under Rule 37 a court prior to dismissal of an action must warn a "pro se" litigant of possible dismissal if he does not appear for his deposition.

III. Whether Plaintiff's temporary inability to obtain counsel to represent him at his deposition is an "inability" to make discovery excusing non-compliance within the meaning of *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197.

IV. Whether in determining a motion to recuse under recently enacted 28 U.S.C. § 455(b), a district court must consider its record comments and rulings which show a reluctance to exercise its adjudicatory powers, a deference to Defendants' delaying tactics, and a preconception of the merits of the case.

Constitutional Provisions, Statutes and Rules Involved

The constitutional provision, statutes and rules involved, which are set forth in Appendix A, are:

1. United States Constitution, Fifth Amendment.
2. Title 28 United States Code Section 144.
3. Title 28 United States Code Section 455.
4. Rule 37, Federal Rules of Civil Procedure.

Statement of the Case

Petitioner, a male, is an Associate Professor at the University of Pittsburgh. After obtaining a favorable determination from the Equal Employment Opportunity Commission, whose

conciliation efforts failed, petitioner brought this civil rights action for injunctive and monetary relief, and alleged discrimination and retaliation by the Defendant University and various of its officers and trustees on account of his national origin and his assistance to women and minorities in obtaining equal employment opportunities at the University.[1] The District Court dismissed the action for Dr. Oskoui's failure to appear for his deposition, and the Third Circuit Court of Appeals affirmed.

A. Facts Relating to Improper Dismissal

This controversy concerns Dr. Oskoui's failure to appear for his deposition during a very short period—April 7, 1977 to July 19, 1977. The record clearly demonstrates that prior to April 7, 1977 Plaintiff vigorously pursued his lawsuit and complied with all Court orders.[2]

On March 14, 1977, acting on Dr. Oskoui's Motion To Specify Discovery, the District Court ordered Dr. Oskoui to give his deposition first. The Court at that time denied *all* of Dr. Oskoui's discovery requests except for one deposition pending determination of a preliminary injunction.[3] Thereafter, defendants noticed Dr. Oskoui's deposition for April 7, 1977, and Dr. Oskoui requested a certification to appeal under 28 U.S.C. § 1292(b), which was denied April 6, 1977.

[1] The Complaint alleges causes of action based on 42 U.S.C. §§ 1981, 1983 and 1985(3), 42 U.S.C. § 2000e *et seq.* and the First Amendment.

[2] Since the whole record must be considered in determining the propriety of dismissal for failure to make discovery, *Nat'l Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 641-642, *reh den* 429 U.S. 874, the facts causing the delays in this case between December, 1975 when suit was filed until April 7, 1977 are set forth in Appendix G.

[3] Plaintiff's request for a preliminary injunction, filed fifteen (15) months earlier, was still not resolved by the District Court as of March, 1977. See Appendix G.

However, Dr. Oskoui understood from his attorneys that the pending appeal would postpone all discovery including his deposition.[4] Therefore, he had on April 3, 1977 left for a professional conference in Chicago of which he had informed his attorneys. He did not return to Pittsburgh until April 30, 1977 and consequently he missed the deposition. His failure to appear was not willful.

On April 11, 1977 Defendants moved for limited sanctions, which the Court granted on April 14, 1977 by dismissing Plaintiff's Petition for a Preliminary Injunction (but not the lawsuit itself). The Court at that time permitted Plaintiff thirty days to secure counsel (his original counsel having withdrawn on April 13, 1977), with discovery to follow for fifty days thereafter.

Defendants again noticed Plaintiff's deposition for May 16, 1977.[5] Plaintiff wrote letters to the Court and Defendants' counsel and filed two affidavits in which he timely and respectfully requested an enlargement of time and set forth in detail his unsuccessful efforts to secure counsel.[6]

When Plaintiff did not appear for his deposition, Defendants again moved for sanctions. The District Court reaffirmed the schedule set forth in its April 14, 1977 order *but indicated that the action would not be dismissed unless Plaintiff failed to file a pretrial statement* (see June 9, 1977 order, Appendix E). Plaintiff *fully complied* with this order by filing

[4] This is documented by a letter to his attorneys dated April 1, 1977, which was sent to the trial court May 2, 1977 with plaintiff's explanation for his absence (see June 9, 1977 Order, Appendix E, p. 39).

[5] Defendants later agreed to a 10 day postponement of this deposition.

[6] Defendant has stipulated that Plaintiff contacted 30 law firms or individual lawyers in attempting to retain counsel from the time his counsel withdrew until he retained Daniel M. Berger.

While *Societe* and *National Hockey League* provide guidance in applying discovery sanctions, this Court's further supervision is needed in respect to several unanswered questions which are raised by this case including whether an abuse of discretion occurs in requiring a party to give his deposition without ample time to secure counsel, whether prior to dismissal a layman must be warned—or at least not be misled—as to possible dismissal and whether the dismissal sanctions may be imposed punitively, rather than coercively.

The dismissal in this case was punitive, but drastically unlike the dismissal in *National Hockey League*, it could not serve to foster compliance by other litigants in other cases. An analysis of *National Hockey League* highlights the error of the District Court in dismissing this action and the need for this Court's supervision.

First, in *National Hockey League* dismissal was applied against "seasoned attorneys who know and comprehend the intricacies of federal practice and the importance of discovery in protracted litigation", 63 F.R.D. at 656, whereas here dismissal was for actions of a layman who, against his wishes, did not have the advice of counsel.

Second, unlike in *National Hockey League*, Plaintiff herein was misled as to the consequences of his actions, as the District Court implied dismissal would not occur if Plaintiff filed his pretrial statement, which Plaintiff in fact prepared and filed without the assistance of counsel.

Third, the default in this case was excusable by Plaintiff's good faith efforts to secure counsel, his timely requests for adequate time to do so, and his offer to give his deposition immediately upon securing new counsel.

Finally, laymen in Plaintiff's situation not warned of the implications of *National Hockey League* as interpreted herein,

might well act as Plaintiff did, believing their actions to be appropriate and in good faith, *i.e.*, dismissal of this case will not foster compliance by other *pro se* litigants in other cases.

Litigants have little protection from the imposition of arbitrary sanctions. Some District Courts may, as here, be too ready to impose harsh sanctions in circumstances not contemplated by this Court in *National Hockey League*. The purpose of Rule 37 is to foster compliance, not to mete out punishment, and this case is an appropriate vehicle by which this Court should so state.

The continuing importance of the questions posed by this case and related questions are reflected in part by this Court's own docket, which reveals in recent months two petitions for certiorari involving discovery sanctions.[9] Supreme Court review of this case will assure that lower courts impose sanctions fairly and will consequently bolster confidence in our Court system.

II. The District Court's purely punitive dismissal of this case and its effective denial of plaintiff's right to proceed with counsel were a denial of due process conflicting in principle with this Court's holdings in *Hammond Packing Co. v. State of Arkansas.*

Prior to the adoption of Rule 37, F.R.Civ.P., this Court in *Hovey v. Elliott*, 167 U.S. 409, held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. In *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, this Court found consistent with the Due Process Clause of the

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[9] No. 77-1782, *Arthur Anderon & Co. v. Ohio, cert. den.* 47 U.S.L.W. 3222; and No. 78-261, *Independent Invester Protective League v. Touche Ross & Co., cert. den.* 47 U.S.L.W. 3246.

Fourteenth Amendment, a state court's order striking an answer and rendering default judgment against a defendant who refused to produce documents. *Hammond* distinguished *Hovey* as being "mere punishment". Due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that refusal to produce material evidence was an admission that the asserted defense lacked merit.

This holding was re-examined in *Societe Internationale, supra,* where construing Rule 37 in light of the due process clause, this Court held dismissal was not justified where compliance would have violated foreign law. *Societe* noted that the "presumption utilized by the Court in the *Hammond* case might well falter" where the failure to comply resulted from inability despite good faith efforts, 357 U.S. at 210.

In this case it is unmistakably clear that the dismissal order was not coercive but was purely punitive.[10] The holdings below therefore conflict in principle with the above cases.

Moreover, the effective denial of Plaintiff's right to proceed with counsel conflicts in principle with this Court's statement in *Powell v. Alabama,* 287 U.S. 45, 69 that:

> . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.

[10] The punitive nature of the dismissal order is apparent from the Court's failure to warn Plaintiff of dismissal should he not comply, the Court's reversal of its earlier determination not to dismiss, and the five month lapse between Plaintiff's new counsel's offer to proceed and the dismissal order.

III. The decisions below have effectively nullified the 1974 Amendments to 28 U.S.C. § 455 with which Congress intended to broaden the grounds for recusal and abolish the "duty to sit" doctrine.

In 1974, Congress substantially amended 28 U.S.C. § 455 to broaden and clarify the grounds for judicial disqualification.[11] Section 455 overruled the judicially developed principle applied to § 144 recusal proceedings that a judge has a "duty to sit" which required a decision against recusal in any close case, *SCA Services, Inc. v. Morgan,* 557 F.2d 110, 113 (7th Cir. 1977), by adopting the requirement that a judge must disqualify himself in any circumstance where "his impartiality might reasonably be questioned".

In this case, the District Court failed to acknowledge any difference in the applicable standards for disqualification as a result of the 1974 Amendment to § 455, and applied an erroneous standard that was too narrow even under the pre-1974 statute. Simply stated the Court refused to examine its record comments and rulings for evidence of personal bias. Moreover, the District Court relied on the "duty to sit" doctrine in declining to recuse itself.

[11] See generally, Senate Report No. 93-419, 93rd Cong., 1st Sess. (1973); House Report No. 93-1453, 93rd Cong., 2d Sess. (1974); U.S. Code Cong. & Adm. News, 93rd Cong., 2d Sess. (1974); Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee of the Judiciary, United States Senate, 93rd Cong., 1st Sess. on S-1064 (1973); Hearings before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 93rd Cong., 2d Sess. on S-1064 (1974); Thode, Reporter's Notes to Code of Judicial Conduct (1973). See also, Note, "The Elusive Appearance of Propriety: Judicial Disqualification Under Section 455", 25 DePaul L.Rev. 104 (1975), and Note, "Disqualification of Judges & Justices in the Federal Courts", 86 Harv.L.Rev. 736 (1973).

The application of § 455 is an important question of federal law which has not been, but should be, settled by this Court. Moreover, the narrow interpretation of § 455 in this case conflicts with the view of the Seventh Circuit in *SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977) which held that the "duty to sit" doctrine was abolished by the 1974 Amendments.

Conclusion

For the reasons set forth above Petitioner requests a writ of certiorari to the Third Circuit Court of Appeals should issue.

Respectfully submitted,

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APPENDIX A

Relevant Constitutional and Statutory Provisions and Rules

United States Constitution, Amend. 5

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 28 U.S.C. § 144

§ 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at

which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

As amended May 24, 1949, c. 139, § 65, 63 Stat. 99.

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver

may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

As amended Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609.

Rule 37, Federal Rules of Civil Procedure

FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) and 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent

of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedie t party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service on the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; March 30, 1970, eff. July 1, 1970.

APPENDIX B

Decision of Third Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 78-1198

DR. M. OSKOUI,

Appellant,

vs.

THE UNIVERSITY OF PITTSBURGH, WESLEY POSVAR, Ph.D., NATHAN J. STARK, JOSEPH A. BIANCULLI, Ph.D., JOSEPH P. BUCKLEY, Ph.D., BALWANT N. DIXIT, Ph.D., RHOTEN SMITH, Ph.D., EDISON MONTGOMERY, FRANCIS S. CHEEVER, M.D., WILLIAM H. REA, ROGER S. AHLBRANDT, HENRY L. HILLMAN, S. HARRIS JOHNSON, III, M.D., LEON FALK, C. HOLMES WOLFE, JR., HARVEY J. HAUGHTON.

(D.C. Civil No. 75-1587)

On Appeal From the United States District Court
For the Western District of Pennsylvania

Argued September 8, 1978

Before: GIBBONS, HUNTER and GARTH, *Circuit Judges*

Daniel M. Berger, Michael P. Malakoff, Richard A. Finberg, Berger, Kapetan & Malakoff, 508 Law and Finance Building, Pittsburgh, PA. 15219, *Attorneys for Appellant.*

Wilbur McCoy Otto, Stewart M. Flam, Dickie, McCamey & Chilcote, 3180 U.S. Steel Building, Pittsburgh, PA 15219, *Attorneys for Appellees.*

Appendix B—Decision of Third Circuit Court of Appeals.

JUDGMENT ORDER

Dr. M. Oskoui appeals from the dismissal, pursuant to Fed. R. Civ. P. 37(b)(2), of his civil rights complaint against The University of Pittsburgh and others, contending

(1) that the trial judge should have granted his recusal motion prior to ruling on the motion for sanctions for failure to make discovery; and

(2) that the sanction imposed was excessive.

We find no error.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

Costs taxed in favor of appellee.

Dated: Sep 11 1978

By the Court,

JOHN J. GIBBONS,
Circuit Judge.

Attest

THOMAS F. QUINN,
Clerk.

Certified as a true copy and issued in lieu of a formal mandate on October 3, 1978.

Test:

M. ELIZABETH FERGUSON,
Chief Deputy Clerk,
U.S. Court of Appeals for
the Third Circuit.

APPENDIX C

District Court Opinion Dismissing Case

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DR. M. OSKOUI,

Plaintiff,

vs.

THE UNIVERSITY OF PITTSBURGH, WESLEY W. POSVAR, Ph.D., CHANCELLOR, NATHAN J. STARK, VICE CHANCELLOR OF HEALTH PROFESSIONS, UNIVERSITY HEALTH CENTER, JOSEPH A. BIANCULLI, Ph.D., DEAN OF SCHOOL OF PHARMACY, JOSEPH P. BUCKLEY, Ph.D., FORMER CHAIRMAN OF DEPARTMENT OF PHARMACOLOGY, UNIVERSITY OF PITTSBURGH SCHOOL OF PHARMACY, BALWANT N. DIXIT, Ph.D., CHAIRMAN OF DEPARTMENT OF PHARMACOLOGY, UNIVERSITY OF PITTSBURGH SCHOOL OF PHARMACY, RHOTEN SMITH, Ph.D., PROVOST, UNIVERSITY OF PITTSBURGH, EDISON MONTGOMERY, ASSOCIATE VICE CHANCELLOR OF HEALTH PROFESSIONS, FRANCIS S. CHEEVER, M.D., FORMER VICE CHANCELLOR OF HEALTH PROFESSIONS, UNIVERSITY OF PITTSBURGH, WILLIAM H. REA, CHAIRMAN, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH, ROGER S. AHLBRANDT, TRUSTEE, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH, HENRY L. HILLMAN, TRUSTEE, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH, S. HARRIS JOHNSON, III, M.D., TRUSTEE, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH, LEON FALK, TRUSTEE, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH, C. HOLMES WOLFE, JR., TRUSTEE, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH, HARVEY J. HAUGHTON, TRUSTEE, BOARD OF TRUSTEES OF THE UNIVERSITY OF PITTSBURGH,

Defendants.

Civil Action No. 75-1587

BARRON P. McCUNE, *District Judge*
December 15, 1977.

OPINION

Plaintiff, an Associate Professor in the Department of Pharmacology at the University of Pittsburgh, filed this action, alleging that the defendants, the University of Pittsburgh, itself, and individual members of its faculty, administration and Board of Trustees, have engaged in employment discrimination against him. We now considered the defendants' Motion to Dismiss, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, for plaintiff's failure to comply with orders of this court to submit to a deposition. Recognizing the severity of such a sanction, we believe, nevertheless, that plaintiff's conduct in this case justifies an order of dismissal. Accordingly, the defendants' motion will be granted.

A chronology of the events which lead to this motion follows. The Complaint, filed December 16, 1975, alleged that defendants attempted to remove him from his teaching position, interfered with his scientific research and harrassed him in various ways in retaliation for plaintiff's support of equal employment opportunities for women on the University faculty. A Motion for a Preliminary Injunction accompanied the filing of the Complaint. At the time, plaintiff was the subject of an internal University administrative proceeding but apparently had not been threatened by dismissal or loss of tenure. Defendants filed an objection to plaintiff's request for a preliminary injunction hearing. On January 28, 1976, we ordered that plaintiff show cause why the preliminary injunction hearing should not be held in abeyance until the administrative proceedings were concluded. Several procedural steps later, an oral argument on this issue was held on May 20, 1976.

At the argument it was learned that the University had stopped the internal administrative proceeding. We determined that any immediate threat of plaintiff's termination from his employment had been removed, and that conciliation between the parties was possible. It was ordered that the preliminary injunction hearing be held in abeyance indefinitely. Counsel were urged to withhold the commencement of discovery pending the outcome of conciliation efforts.

Apparently, these efforts never got off the ground. On July 13, 1976, plaintiff filed a motion for leave to commence discovery. Following oral argument, the motion was granted and discovery was permitted to commence on September 17, 1976. A hearing on the request for a preliminary injunction was scheduled for November 11, 1976.

The record will show that from this point on, counsel for the parties were unable to agree on the order in which depositions would be taken. Various notices, motions for protective orders and motions to quash depositions were filed by both parties. Apparently, plaintiff would not agree to submit to a deposition until the depositions of a number of University personnel were first taken. The defendants presented a motion for a protective order on October 12, 1976, in which they expressed doubt that plaintiff would ever submit himself for a deposition. (See n.1, *infra*).

By order of October 21, 1976, this court suspended the taking of any mandatory depositions until the hearing scheduled for November 11, 1976. We suggested, but did not require, that plaintiff be deposed prior to the numerous depositions sought from the defendants. On November 10, 1976, we granted a motion, filed by plaintiff, for continuance of the hearing scheduled for the following day. We also ordered that discovery resume, and again suggested that plaintiff first submit himself for a deposition.

Defendants filed a motion to dismiss plaintiff's request for a preliminary injunction on January 12, 1977. Argument on this motion was set for March 11, 1977. On February 23, 1977, plaintiff moved for an order specifying discovery schedules.

Following the argument of March 11, this court issued an order on March 14, 1977. By that order, defendants' motion to dismiss was denied, and a hearing on the complaint for a preliminary injunction was scheduled for May 9, 1977. In addition, plaintiff's motion to specify discovery was granted. It was ordered that plaintiff would be deposed first and prior to April 18, 1977. It was further ordered that prior to the hearing plaintiff could depose Dr. Dixit, one of the defendants and chairman of plaintiff's department. No other persons were to be deposed. Defendants' motion for a protective order as to the depositions of Dr. Posvar, a defendant and Chancellor of the University, and another individual was granted.

Pursuant to this order, defendants filed, on March 18, 1977, a notice that plaintiff's deposition would be taken on April 7, 1977.

On March 31, 1977, plaintiff requested that we certify for appeal, under 28 U.S.C. § 1292(b), our order of March 14, 1977, granting the above mentioned protective orders. By order of April 6, 1977, we denied this request. On April 1, 1977, plaintiff had filed a notice that the deposition of Dr. Dixit would be taken on April 15, 1977.

On April 7, 1977, Dr. Oskoui's counsel appeared at the scheduled time and place for the taking of his deposition, but Dr. Oskoui did not appear. On April 11, 1977, this court received a motion of plaintiff's counsel to withdraw,[1] stating that plaintiff had been advised personally by counsel with notice of the motion. Also, on April 11, 1977, defendants filed a motion seeking to quash the scheduled deposition of Dr. Dixit, which we granted that same day, and a motion for sanctions seeking dismissal of the request for a preliminary injunction. On April 13, 1977, we granted the motion of plaintiff's counsel to withdraw.

On April 14, 1977, we issued an order granting the defendants' motion for sanctions and dismissing the petition for a preliminary injunction. Additionally, this order set the following schedule: plaintiff was extended 30 days within which to secure new counsel or to decide to represent himself; thereafter, discovery was to commence and proceed for a period of fifty days; plaintiff's pretrial statement was to be

[1] It must be noted that plaintiff's counsel had previously filed a motion to withdraw on October 5, 1976, at a time when Dr. Oskoui's apparent refusal to submit to a deposition first came to this court's attention. In that prior motion to withdraw, plaintiff's counsel noted that plaintiff wished to proceed with discovery in manners contrary to their understanding of good practice. The following day, however, the motion to withdraw was itself withdrawn.

filed on July 5, 1977, defendants' on July 15, 1977. A pretrial conference was scheduled for July 19, 1977.

Pursuant to this order, defendants filed, on April 25, 1977, a notice that plaintiff's deposition would be taken on May 16, 1977.

On May 4, 1977, we received a letter from plaintiff which sought to justify his absence from the scheduled deposition of April 7, 1977. In the letter, plaintiff acknowledged that he was aware of our March 13, 1977 order (stating that he would be deposed prior to April 18, 1977) at the time it was issued. Indeed, he acknowledged his awareness that his deposition had been scheduled for April 7, 1977. Plaintiff asserted in this letter that his attorneys were notified in advance that the date of April 7 was inconvenient for him, and that he believed all scheduled depositions to have been postponed because of his "appeal" of our discovery orders. Plaintiff further stated that his attorneys never indicated to him their intention to withdraw. This assertion contradicts the averments of his attorneys in their motion to withdraw.

In a letter dated May 11, 1977, plaintiff notified defendants' counsel that he would not attend the deposition scheduled for May 16, 1977, because he was without an attorney and planned to be away from Pittsburgh on that date. Defendants' counsel responded on May 13, 1977, by notifying plaintiff that his deposition would be rescheduled for May 25, 1977. This court then received a letter from plaintiff dated May 13, 1977, asking 60 additional days to properly select an attorney. On May 24, 1977, defendants' counsel received a letter from Dr. Oskoui stating that he would not attend the deposition scheduled for the following day. Plaintiff then

filed an affidavit on May 24, 1977, and another on May 25, 1977, essentially restating his previous communications with the court.

Defendants filed a motion for sanctions on June 2, 1977, seeking dismissal of the action. Plaintiff responded with a letter to the court dated June 4, 1977, in which he requested additional time to secure substitute counsel. On June 9, 1977, we issued an order to the effect that the schedule set forth in our earlier order of April 14, 1977, would remain unchanged, that plaintiff would be granted no further extensions, and that the court would refrain from ruling on a motion for sanctions until the expiration of the discovery period.

By letter dated June 23, 1977, defendants' counsel asked plaintiff to provide a date prior to the close of discovery when he would be available for deposition. No response to this inquiry was made. The discovery period closed on July 4, 1977. On July 5, plaintiff filed a pretrial statement.

Defendants renewed their motion to dismiss on July 8, 1977. On the date set aside for a pretrial conference (July 19, 1977), plaintiff appeared in court with new counsel, who represented that plaintiff would be willing to submit himself for deposition in sessions lasting half a day at a time. The conference was postponed and argument on the motion to dismiss was eventually held on October 13, 1977. Subsequently, we received plaintiff's motion that all prior discovery orders be vacated and a new discovery schedule be promulgated.

Rule 37(d) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> "If a party . . . fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court . . . on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule."

Rule 37(b)(2)(c), incorporated above, provides that the court may make:

> "An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

The court is convinced that the extreme sanction of dismissal is justified under the circumstances that have been described.

On two occasions, the orders of October 21 and November 10, 1976, the court suggested that plaintiff submit first to a deposition prior to the taking of the various depositions of University personnel proposed by the plaintiff. Given the nature of the case and the number of deponents proposed by plaintiff, this seemed the most equitable solution to the discovery disputes which had arisen between the parties. We were aware, at this point that defendants' counsel believed that plaintiff would never agree to be deposed, but we had no way of knowing if this were true. We did not wish to become involved in setting discovery schedules and our suggestions as to the order of depositions seemed the most reasonable.

It was not until March 14, 1977, that we mandated a discovery schedule, on plaintiff's motion. This order, and the pursuant notice of deposition sent to plaintiff's counsel by defendants' counsel, were flagrantly ignored by Dr. Oskoui. His account of the events surrounding his failure to appear at his scheduled deposition on April 7, 1977, as contained in his letter to the court of May 2, 1977, differs significantly from that of his former counsel and evidences a complete disregard for the judicial process. With full knowledge that his deposition was scheduled for Thursday, April 7, 1977, plaintiff sent to his attorneys a letter which was apparently received on Monday, April 4, informing them that he had left Pittsburgh on Sunday, April 3, 1977.

Following our order of April 14, 1977, Dr. Oskoui again failed to appear for scheduled depositions on two occasions. Apparently, plaintiff was willing to forego his own access to the discovery process in order to deny defendants the opportunity to depose him. We see no reason to retract our previous orders of March 14, April 14 and June 9, 1977. In our opinion, plaintiff has engaged in a course of conduct which was calculated to disrupt the orderly progression of this case.

Support for dismissal of this action is found in the following language employed by The Supreme Court in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S. Ct. 2778 (1976):

> "But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be

deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts. . . ." 427 U.S. at p. 643.

An order granting the defendants' Motion to Dismiss this action and denying plaintiff's motion to vacate prior discovery orders follows. Plaintiff will not be assessed any costs.

BARRON P. McCUNE,
United States District Judge.

Dated: December 15, 1977.

cc: Counsel of record.

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DR. M. OSKOUI,
Plaintiff,

vs.

UNIVERSITY OF PITTSBURGH, *ET AL.*,
Defendants.

Civil Action No. 75-1587

ORDER

AND NOW, December 15, 1977, the defendants' Motion to Dismiss the above captioned action for damages and injunctive relief is hereby granted.

The plaintiff's Motion to Vacate Discovery Orders and to Set Discovery Schedule is hereby denied.

BARRON P. McCUNE,
United States District Judge.

cc: Daniel M. Berger, Esq.
508 Law & Finance Building
Pittsburgh, Pa. 15219

Wilbur McCoy Otto, Esq.
Stewart M. Flam, Esq.
Dickie, McCamey and Chilcote
3180 U.S. Steel Building
600 Grant Street
Pittsburgh, Pa. 15219

APPENDIX D

District Court Opinion of April 14, 1977

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DR. M. OSKOUI,

Plaintiff,

vs.

UNIVERSITY OF PITTSBURGH, *ET AL.*,

Defendants.

Civil Action No. 75-1587

ORDER

AND NOW, April 14, 1977, Motion for Sanctions having been filed by defendant on April 11, 1977, under Rule 37, and the motion having asked for Sanctions in the form of a dismissal of plaintiff's Petition for a Preliminary Injunction, and it appearing that plaintiff has refused to submit to a deposition by failing to appear when all counsel were assembled, including plaintiff's counsel, and it appearing that the deposition was ordered by the court preparatory to a hearing on the Petition for a Preliminary Injunction scheduled for May 9 and May 10, 1977,

AND it further appearing there has been no explanation from plaintiff or his attorneys why plaintiff did not appear for the deposition duly scheduled nor will there likely be any,

AND it further appearing that counsel for plaintiff have moved for permission to withdraw, which motion has been granted by order of April 13, 1977,

AND it appearing that the court had previously held argument on a Motion to Dismiss the Petition for a Preliminary Injunction (March 11, 1977) and had denied the motion by order of March 14, 1977, and had identified the plaintiff and Dr. Balwant N. Dixit as the persons who should be deposed prior to the hearing fixed for May 9 and May 10, 1977,

AND it appearing that discovery has been a recurring problem throughout this litigation which is the reason for the order of March 14, 1977,

It thus appearing that plaintiff has refused to carry out our order without explanation, the Motion for Sanctions is granted and the Petition for a Preliminary Injunction is dismissed.

It is apparent, however, that this order does not dispose of the litigation. Accordingly, the following orders are made:

1. Plaintiff is extended 30 days within which to secure new counsel or to decide that he will represent himself.

2. Thereafter, discovery shall commence and shall be permitted for a period of fifty days in compliance with our usual pretrial rules.

3. Plaintiff's pretrial statement shall be filed on or before July 5, 1977. Defendants' pretrial statement shall be filed on or before July 15, 1977.

4. Pretrial Conference will be held on July 19, 1977, at 4:00 P.M. in Court Room No. 10.

BARRON P. McCUNE,
United States District Judge.

cc: Janet Moschetta, Esq.
830 Frick Building
Pittsburgh, Pa. 15219

Margaret A. Beller, Esq.
927 - 15th Street, N.W.
Washington, D.C. 20005

Wilbur McCoy Otto, Esq.
Stewart M. Flam, Esq.
Dickie, McCamey & Chilcote
3180 U.S. Steel Building
600 Grant Street
Pittsburgh, Pa. 15219

Dr. M. Oskoui
P.O. Box 7197
Oakland Station
Pittsburgh, Pa. 15213

APPENDIX E

District Court Order of June 9, 1977

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DR. M. OSKOUI,
Plaintiff,

vs.

UNIVERSITY OF PITTSBURGH, *ET AL.*,
Defendants.

Civil Action No. 75-1587

ORDER

AND NOW, June 9, 1977, Motion for Sanctions having been filed on June 2, 1977, by defendant, which asks for dismissal of the above captioned action because of plaintiff's continued refusal to appear for deposition, and it appearing that plaintiff has filed a *pro se* motion by his letter of June 4, 1977, which attempts to answer the motion of defendant and asks for an extension of time until July 30, 1977, within which to obtain substitute counsel,

AND it appearing that we had issued an order on April 14, 1977, governing the procedure to be followed in this case, it appearing that our order of April 14, 1977, required that plaintiff obtain substitute counsel or decide to represent himself, within 30 days of April 14, 1977, and that thereafter discovery was to commence and be permitted for 50 days in compliance with the usual pretrial rules and that the plaintiff's pretrial statement was to be filed on July 5, 1977. Defen-

dants' pretrial statement was to be filed on July 15, 1977, and pretrial conference was to be held on July 19, 1977, at 4:00 P.M.,

AND that the record will show that plaintiff's attorneys were permitted to withdraw on April 13, 1977,

AND that the record will show that following our order of April 14, 1977, the following letters were received from plaintiff:

1. Letter of May 2, 1977, seeking to justify plaintiff's absence at his deposition which had been scheduled after a hearing before the court and after the court had ordered the deposition.

2. Letter of May 13, 1977, attaching copy of letter to Mr. McCoy of May 11, 1977, and asking 60 days additional time to obtain counsel.

3. Letter of June 4, 1977, which we interpret as a reply to the Motion for Sanctions and asking for an extension until June 30, 1977, to obtain counsel and it appearing, we repeat, that the Motion for Sanctions is based on plaintiff's continued refusal to be deposed in spite of our previous order that he submit to a deposition,

IT IS ORDERED that the case will not be dismissed at this time for plaintiff's refusal to submit to deposition.

The April 14, 1977 order will remain unchanged. Plaintiff shall have no further extensions. He has apparently not obtained counsel, but he may have decided to represent himself in spite of his statements that he will not do so.

He will not be permitted discovery, of course, unless he submits to deposition, so the discovery period may expire without consequence.

The date for the filing of his pretrial statement will remain unchanged. If, in fact, he refuses to file his pretrial statement at the required time, the Motion for Sanctions may be renewed forthwith.

BARRON P. McCUNE,
United States District Judge.

cc: Dr. M. Oskoui
P.O. Box 7197
Oakland Station
Pittsburgh, Pa. 15213

Wilbur McCoy Otto, Esq.
Stewart M. Flam, Esq.
Dickie, McCamey & Chilcote
3180 U.S. Steel Building
600 Grant Street
Pittsburgh, Pa. 15219

APPENDIX F

District Court Memorandum Refusing Recusal Motion

IN THE UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

DR. M. OSKOUI,

Plaintiff,

vs.

UNIVERSITY OF PITTSBURGH,

Defendant.

Civil Action No. 75-1587

MEMORANDUM

BARRON P. McCUNE, *District Judge*
March 18th, 1977

A "Motion to Recuse" the undersigned having been filed pursuant to 28 U.S.C. 144 and 455(b)(1), the motion has been duly considered and it will be denied. We consider it our duty to proceed with the case. See *Tenants and Owners v. U.S. Dept. of Housing and Urban Development,* 338 F. Supp. 29 (1972) and *United States v. Mitchell,* 377 F. Supp. 1312 (1974).

There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is, see *U.S. v. Mitchell, supra.*

The affidavit in this case recites only comments of record, so it is insufficient. In assessing sufficiency of the facts alleged by affidavit, decisions have emphasized that any bias must be personal, that is, have its origin "in sources beyond the four corners of the court room."

Although plaintiff briefly refers to his visits to Chambers and explains that he came only to seek expedition of his litigation, we have never met with him personally. We did instruct his attorneys to instruct him to cease the practice of visiting Chambers and calling Chambers for obvious reasons.

An order will be entered denying the motion.

BARRON P. McCUNE,
United States District Judge.

cc: Counsel of record.

Appendix F—District Court Memorandum Refusing Recusal Motion.

IN THE UNITED STATES DISTRICT COURT
For the Western District Court of Pennsylvania

DR. M. OSKOUI,

Plaintiff,

vs.

UNIVERSITY OF PITTSBURGH,

Defendant.

Civil Action No. 75-1587

ORDER

AND NOW, March 18, 1977, the Motion to Recuse the undersigned in the within case, is denied.

BARRON P. McCUNE,
United States District Judge.

cc: Janet Moschetta, Esq.
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Pittsburgh, Pa. 15219

Margaret A. Beller, Esq.
927 - 15th Street, N.W.
Washington, D.C. 20005

Wilbur McCoy Otto, Esq.
Stewart M. Flam, Esq.
Dickie, McCamey & Chilcote
3180 U.S. Steel Building
Pittsburgh, Pa. 15219

APPENDIX G

Summary of Facts Prior to Plaintiff's Default

The Record Demonstrates Plaintiff Diligently Pursued His Case In Compliance With The Federal Rules

After obtaining a favorable determination from the EEOC, Plaintiff on December 16, 1975 commenced this action and moved for a preliminary injunction. A hearing was scheduled for December 23, 1975 and Plaintiff's witnesses, including experts, were present on that date. However, Defendants immediately before the December 23rd hearing filed a Motion to Dismiss based on violation of a local rule of court barring the pleading of a specific sum for unliquidated damages. Plaintiff during the pre-hearing conference orally moved to strike the offending portions of the Complaint, but the Motion to Dismiss was granted with leave to amend. The Court then postponed the hearing, despite Plaintiff's expense for preparation and witnesses.

At an argument on May 20, 1976 to determine *whether a hearing should be scheduled* on the preliminary injunction motion (filed five months previously), Defendant's counsel produced a letter stating that further University disciplinary proceedings against Dr. Oskoui were being discontinued. Over Plaintiff's objections that violations of his rights continued to jeopardize his employment, the Court ordered that the preliminary injunction hearing and all discovery be stayed indefinitely so that settlement possibilities could be explored.

The next day, Plaintiff's counsel telephoned Defendants to explore settlement but Defendant's counsel insisted that Plaintiff prepare an agenda and promised to call Plaintiff within 24 hours after receiving it. On June 18, 1976, Plaintiff

submitted an eight page agenda but received no response. On July 13, 1976 Plaintiff filed a Motion to Commence Discovery (*i.e.*, vacate the Court's May 20, 1976 discovery stay order). On September 17, 1976, Plaintiff's motion to commence discovery was granted.

On September 16, 1976 (*prior* to the Court's granting *Plaintiff's* motion to commence discovery) Defendants mailed a notice to take Dr. Oskoui's deposition, which was subsequently cancelled because Plaintiff's counsel was in trial. At and following the September 17 argument, counsel for Defendants steadfastly and persistently refused to supply dates for depositions of the Defendants.

Plaintiffs also made other efforts to obtain discovery, but Defendants resisted. (See Plaintiff's motions to compel discovery, filed when *Defendant* Dixit failed to appear for deposition and when Defendants filed no response to Plaintiff's Request For Production). Plaintiff requested the Court to specify dates for discovery as early as September 17, 1976 and repeated this request in November, 1976 when, because of the Court's refusal to compel discovery, postponement of the preliminary injunction hearing was necessary. Again on December 15, 1976, and again on February 23, 1977, Plaintiff requested that discovery dates be specified.

On March 14, 1977—some 15 months after suit was filed—the District Court for the first time acted on the discovery problems besetting this litigation. The Court ordered Plaintiff to submit to deposition first, and denied Plaintiff all discovery except one deposition pending a hearing on the preliminary injunction for which Plaintiff needed the discovery. Plaintiff had at this juncture fully complied with every order of the District Court and with the Federal Rules of Civil Procedure.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-912

DR. M. OSKOUI,

Petitioner,

vs.

THE UNIVERSITY OF PITTSBURGH; WESLEY POSVAR, Ph.D.; NATHAN J. STARK; JOSEPH A. BIANCULLI, Ph.D.; JOSEPH P. BUCKLEY, Ph.D.; BALWANT N. DIXIT, Ph.D.; RHOTEN SMITH, Ph.D.; EDISON MONTGOMERY; FRANCIS S. CHEEVER, M.D.; WILLIAM H. REA; ROGER S. AHLBRANDT; HENRY L. HILLMAN; S. HARRIS JOHNSON, III, M.D.; LEON FALK; C. HOLMES WOLFE, JR.; and HARVEY J. HAUGHTON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement of the Case

Respondents submit that the facts set forth by Petitioner in his "Statement of the Case" are inaccurate and conclusory. Respondents would refer this court to the factual chronology set forth by the lower court in its Opinion of December 15, 1977 which is included in Appendix C of the Petition For Writ of Certiorari at pp. 25-34.

REASONS FOR DENYING THE WRIT

I. The district court's action of dismissing plaintiff's case comported with this court's holding in *National Hockey League v. Metropolitan Hockey Club, Inc.*

Petitioner, Dr. Oskoui, has fabricated factual differences between his case and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), to persuade this court that the district court expanded *National Hockey League's* holding beyond acceptable limits. On the contrary, the district court's discretionary dismissal of Petitioner's case is clearly sanctioned by *National Hockey League* and Rule 37 of the Federal Rules of Civil Procedure, and there is no reason for this court to review such a "garden variety" application of the rules of discovery.

First, Petitioner is clearly wrong in claiming that his *pro se* status during the last 2½ months of discovery (April 14-July 4, 1977) exempts him from the full force of *National Hockey League's* holding. As this court has stated, the most severe sanctions under Rule 37 may be applied to a *party* who has flouted discovery orders in order to penalize that particular party and deter others from similar conduct.

The existence of counsel is irrelevant so long as the court has found that the party to be punished has indeed exercised a wilfull disregard for the court's authority. The district court determined that Petitioner had ignored at least three orders of court. The Order of March 14, 1977 was defied by Petitioner while he was still represented by counsel, and the orders of April 14, 1977, and June 9, 1977 were flouted by Petitioner beyond the thirty day period granted by the district court for Petitioner to secure substitute counsel. Since the district judge determined that Petitioner had actual knowledge of each of the court's orders and of the scheduled depositions, the

Petitioner's flagrant disregard for these court orders and subpoenas constitutes a knowing and wilfull act of defiance to judicial authority for which the most severe sanctions of Rule 37 should be applied.

Second, Petitioner alleges that he was "misled as to the consequences of his actions," and therefore, the district court should have been "estopped" from dismissing his case. Presumably, Petitioner is referring to the district court's order of June 9, 1977 which did not specifically state that Petitioner's further failure to submit to the taking of his deposition would result in the dismissal of his suit. Any party to litigation must be charged with the knowledge that his flagrant refusal to comply with orders of court may precipitate the dismissal of his case. Furthermore, the June 9, 1977 order of the district court specifically stated that although "the case will not be *dismissed at this time* for Plaintiff's failure to submit to his deposition (emphasis added)," "[p]laintiff shall have no further extensions." (See Appendix E of Petitioner's Petition For A Writ Of Certiorari at p. 40.)

Third, Petitioner argues that his failures to comply with orders of court were excusable, and therefore, there was no wilfullness on his part. This conclusion is specifically rejected by the district court which found that "Plaintiff has engaged in a course of conduct which was calculated to disrupt the orderly progression of this case." (See Appendix C at p. 33 of Petitioner's Petition For Writ of Certiorari).

Petitioner's allegation is based upon his submission to the court of several self-serving letters. These letters set forth various "excuses" for missing prior depositions, and indicated that Petitioner was continuing to look for an attorney beyond the time allotted by the court and would not submit to a deposition until he had secured counsel. Petitioner's

position that he would not be deposed until he had secured new counsel in no way undermines the wilfullness of his refusal to be deposed, since the district court stated that discovery would not be extended beyond July 5, 1977 under any conditions despite Petitioner's frequent requests for more time to secure counsel. Admittedly, Petitioner was compelled to compromise his belief that he should not be forced to submit to a deposition until he had secured alternate trial counsel. However, Petitioner's blind adherence to his beliefs despite contrary judicial decisions and his stubborn refusal to submit to discovery unless conducted under his own terms hardly excused Petitioner from complying with the authority of the court.

Finally, Petitioner avers that the deterrent effect of dismissal emphasized in *National Hockey League* will not be advanced in this case because other *pro se* litigants will not be aware of the consequence of their actions. Not only *pro se* litigants, but all litigants will be "cautioned" by the court's action in this case since all parties are charged with a knowledge of the law and its application to individual conduct. Furthermore, Petitioner is a "seasoned" litigant who has brought at least three separate lawsuits against these respondents alone, and has had the services of at least five different attorneys. Petitioner was well aware of the consequences of his actions since he had suffered dismissal of at least one state court action for refusing to submit to the taking of his deposition.

For the above reasons, the district court's dismissal of Petitioner's action was authorized by the clear language and import of *National Hockey League*, and no unique or unresolved question of law is presented by such dismissal for resolution by this court.

II. Dismissal of Petitioner's case did not constitute a denial of due process.

Petitioner alleges that he was denied due process of law because his failure to comply with the court's orders "resulted from inability despite good faith efforts," *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, and dismissal of his case was therefore, "mere punishment." This allegation is not supported by the record.

The *Societe Internationale* holding is based upon a determination that a party is unable to perform that which the rules of court or specific orders of court demand. "Ability to perform" is the key to any inquiry based upon the *Societe* standard. Petitioner's refusal to submit himself for a deposition was not prompted by inability, but by a steadfast determination to progress with discovery only if discovery was carried out in accordance with Petitioner's own terms.

Furthermore, the court's refusal to allow Petitioner to proceed with discovery after the discovery period had expired and after Petitioner appeared with new counsel, was not a denial of due process under any standard established by this court. The district court had stated to Petitioner in its orders of April 14, 1977 and June 9, 1977 that discovery would terminate on July 4, 1977 despite Petitioner's unofficial requests for further extensions of time to secure counsel. Petitioner's appearance with new counsel *after* the discovery period had ended created no bar to the district court's strict enforcement of the rules of discovery and its prior orders. Petitioner had steadfastly refused to be deposed for the entire course of discovery spanning a period of more than a year and a half, and

the existence of a 2½ month period when Petitioner was acting *pro se* in no way undermined the wilfullness of Petitioner's acts.[1]

III. The district court properly considered Petitioner's motion for recusal.

Petitioner asserts that the lower court "refused to examine its record comments and rulings for evidence of personal bias," and erroneously relied on the "duty to sit" doctrine. Neither of these allegations is correct.

A complete reading of Judge McCune's Memorandum, (Appendix F of Petition For Writ of Certiorari) negates any inference that the lower court did not consider any of the allegations set forth in Petitioner's motion for recusal merely because they concerned actions and comments made in the course of the present action. Rather, the lower court found that Petitioner's affidavit had failed to meet the requirements of legal sufficiency set forth in the applicable case law and statutes. This conclusion is supported by the fact that Judge McCune relied upon the case of *Tenants and Owners v. U.S. Dept. of Housing and Urban Development*, 388 F. Supp. 29 (N.D. Cal. 1972), wherein the court ruled that in the appropriate case, conduct and comments of record could constitute grounds for recusal.

[1] On April 13, 1978 the district court granted Petitioner's counsel leave to withdraw their appearances following the episode of April 7, 1977 in which Petitioner's counsel traveled from Washington D.C. to Pittsburgh for Petitioner's deposition, but Petitioner failed to appear. On April 14, 1977 Judge McCune granted Petitioner 30 days to secure alternate counsel or decide to represent himself. Following this 30 day grace period, Petitioner continued to ignore subpoenas for his presence at depositions and orders from the court that the discovery period would not be extended beyond July 4, 1977.

Appellant also argues that Judge McCune misapplied the standard of review because he relied upon the "duty to sit" doctrine, which Appellant asserts was abrogated by the 1974 amendments to 28 U.S.C. § 455. It appears that the language of § 455(a)[2] has created a greater flexibility in analyzing the facts of particular situations wherein a party moves for recusal. Section 455(a) has been applied to permit recusal where affidavits were held to be insufficient, but where the "total circumstances" presented a reasonable likelihood that an impartial trial could not be held. *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976), *cert. denied* 429 U.S. 951 (1977); *Webbe v. McGhie Land Title*, 549 F.2d 1358 (10th Cir. 1977); *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976).

While § 455(a) may have expanded the bases for recusal beyond those specifically enumerated in § 455(b), it did not open the door to "wholesale" recusals. There must still be a reasonable basis to support disqualification of a judge under § 455(a), and in the absence of such reasonable basis, recusal is not necessary or proper. A judge no longer has a "duty to sit" simply because his impartiality may be questioned for reasons other than those specifically enumerated in § 455(b)(1), but he still has a "duty to sit" where there is absolutely no basis whatsoever to question his impartiality. Any other holding would plague the judicial system with "judge shopping."

Judge McCune's Memorandum merely reflects the proper standard of review that remains unchanged by the amendments to § 455. Where the complainant's affidavit of bias filed

[2] § 455(a) reads as follows: "Any justice, judge, magistrate, or referee in bankruptcy or the United States shall disqualify himself in any proceeding in which his imparitality might reasonably be questioned."

pursuant to § 455(b)(1) is legally insufficient to form a basis for recusal, and there is no other reason that his impartiality might reasonably be questioned[3], then a federal district judge still has an "obligation to sit."

Conclusion

Petitioner's Petition For Writ of Certiorari has raised no special or important legal issues for resolution by this court, and should be denied.

Respectfully submitted,

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[3] It should be noted that Petitioner never raised 28 U.S.C. § 455(b) as a basis for recusal and has never set forth any reason why Judge McCune's "impartiality might reasonably be questioned" for reasons other than those set forth in his original affidavit which was found to be legally insufficient.